No. 14554

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AERIAL LUMBER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

THE HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

F. N. CUSHMAN
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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STATUTES

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JURISDICTION

The District Court had jurisdiction of this action under 28 U.S.C. 1345. Appellant appeals from the judgment entered below on August 16, 1954. Notice of Appeal was filed September 14, 1954. Jurisdiction of this court is conferred by 28 U.S.C. 1291.

STATEMENT OF FACTS

Appellee United States of America brought this action below to recover from appellant damages for the breach of a contract to purchase and remove certain Public Housing Authority "surplus" dwellings. Two separate sales were included in the action, however, because the contractual relationships were identical; no further attention need be given this fact.

Appellant submitted the highest bid for four dwelling units and was awarded the "contract." This "contract" is the summation of the relationship between the parties as contained in the following documents:

Invitation to Bid (R-27).

General Conditions (R.-30) incorporated in the invitation to bid by reference.

Offer and Acceptance of offer (R-25).

Statement and Certificate of Award (R-22).

It is not disputed that the contractual relationship was entered into; therefore, the arguments of the parties, in this court, will primarily be directed to the provisions of the "General Conditions".

Upon appellant's failure to pay the purchase price and remove the dwellings, appellee reoffered the dwellings, receiving offers to purchase in lesser

amounts. The damages sought by appellee below were the differences between the prices offered by appellant and those received on subsequent sale, together with the expenses of sale.

QUESTION PRESENTED

Is the normal measure of damages for breach of contract so limited by the instant contractual provisions that appellee is restricted to a forfeiture of the deposit and reimbursement of actual "out-of-pocket" expenses?

SUMMARY OF ARGUMENT

There is no dispute as to the entrance into the contractual relationship here in question. Further it is admitted that appellant breached the contract by failing to pay the purchase price or performing any of the subsequent conditions.

Therefore, assuming the absence of specific language to the contrary in the contract, the normal rule of damages for breach of contract would apply and appellee would be entitled to recover the difference between the price offered by appellant and that received on subsequent sale after breach, together with additional expenses. This theory was used by the court below in awarding judgment for $2,723.70 plus interest and costs.

Appellant, with special reference to paragraph 2 of the General Conditions (R-30) contends that appellee is limited in its recovery to its "out-of-pocket" expenses and a forfeiture of the deposit accompanying the offer, except in a case where a specific determination by the Contracting Officer of the amount of damages has been made. However, Paragraph 2 of the General Conditions cannot be read apart from the remainder of the contracual language and as will be shown this paragraph has only limited applicability to the damage question, even if interpreted as appellant contends.

Assuming for argument's sake that paragraph 2 of the "General Conditions" wholly governs the remedies for breach and that the term "expenses" as contained therein does not cover a "loss of profit," then it becomes necessary to consider when and to what extent a determination by the Contracting Officer is necessary. Appellee introduced testimony through its witness, Charles Ross, that showed that appellant was informed of the intention of appellee to hold appellant liable for "loss of profit." Appellant was thereafter advised of the amount of appellee's claim by the General Accounting Officer Certificate of Indebtedness, April 3, 1950. At no time has there been any issue as to the calculation of damages. It is a well-settled proposition that the law does not require the perform-

ance of a condition such as this "determination," which is wholly unnecessary.

ARGUMENT

I.

The Contractual Provisions

Appellant's argument that the Court cannot remake a contractual agreement between the parties is conceded. However, in the instant case, we have the typical contract dispute situation, i.e., that the contractual documents are not complete and free from ambiguity. Appellant centers all its attention on paragraph 2 of the General Conditions, R-30, and argues that this paragraph allows appellee to recover no more than its "out-of-pocket" expenses, which were only the cost of readvertising the buildings and the amount of the deposit accompanying the offer, or $355. The last sentence of that paragraph is argued to be inapplicable inasmuch as the evidence did not show that appellant received a determination by the Contracting Officer of the exact amount of damages.

It is important first, to consider that paragraph 2 in only part of the "whole" contract. That paragraph is headed "Performance Security" and that clearly shows the scope of its intended operation. The references as to "expenses incurred by the govern-

ment" shows the primary reasons for the requiring of the bond. To reimburse the government if government funds have to be utilized to complete clearing the site or the dismantling of a partially-removed building, without being forced to rely on a questionable credit risk and the problems of a lawsuit for a relatively minor sum. It is to be noted that in situations of the type above noted, a resale would probably not be practical because no expense can be presumed necessary until performance has begun.

Appellant further relies on restrictions argued from a consideration, out of context, of the last sentence in this paragraph which provides for damages as determined by the contracting officer. Again, the overall purpose of the provisions must be considered, and it is clear that the intention in this sentence was merely to show that the performance security when posted was not to be considered by way of liquidated damages, but on the contrary that there would be damages or expenses which would exceed the amount of the performance bond, which expenses would be a fit subject for determination by the Contracting Officer.

If we assume for purposes of argument, that paragraph 2 is intended to provide the only procedures governing a breach of contract, a study of the other portions of the General Conditions will show that this

paragraph is incomplete and in large measure inconsistent with these other provisions. [In this regard the court's attention is called to the incompleteness through oversight of the record in that page 2 and a portion of page 1 of the General Conditions was designated and not printed. It is set forth hereafter in Appendix A.] Paragraph 3 thereof provides for recovery of the dwelling structures on certain conditions. No mention is made of any requirement that this be conditioned on a determination by the Contracting Officer. Paragraph 6 provides that on certain other conditions the government may take the buildings and charge the purchaser with all costs of performance together with a forfeiture of the purchase price. Again this provision is without reference to any action by the Contracting Officer.

It is interesting to note that paragraph 6 presupposes payment of the full purchase price. In effect the purchaser stands to lose the purchase price plus any expenses suffered by the government. All without any determination by the Contracting Officer; a far more serious liability than that faced by a purchaser who defaults initially. It should also be noted that appellant's argument (p. 19 of Appellant's brief) to the effect that the last sentence of paragraph 2 is limited to "expenses" and that this is the contract's exclusive remedy for breach is belied by the presence

in the conditions of the other remedy provisions above noted.

The Invitation to Bid (R-27) requires in paragraph 5 a deposit in all sales of a similar nature. This deposit is only intended to insure payment of the purchase price, and is directed to be applied thereon hence it is clear that the purchase price is in no way to be secured by the performance security. That this is the case is seen by the provision in parentheses in paragraph 2 that the full purchase price is to be paid simultaneously with the delivery of the performance security.

Why then was a provision assumed by appellant to govern all breaches, included in this paragraph which is directed entirely to relationships subsequent to the time of breach, i.e., after payment of the purchase price in the instant case? On the other hand it is very logically explained, as in fact appellant virtually concedes, if we consider the last sentence as merely an amplification of the procedure to govern the liability for expenses outlined in the sentence above. It is well known that detailed matters of expenditures in a complicated situation are typically matters where government contracts provide for a fact determination by a Contracting Officer. The usual government contract does provide that a deter-

mination of all *factual* disputes shall be made by the Contracting Officer. A complete failure to perform as in this case presents virtually no question of disputed fact and is wholly inappropriate for determination by a Contracting Officer.

Are the portions of paragraph 2, where applicable, typical liquidated damages provision? The paragraph is incomplete in the sense that many breach situations are covered by other contract provisions. It is in a paragraph which has little meaning until the happening of future events, i.e., the posting of performance security and the payment of the price. Contractual provisions limiting liability cannot be inferred from mere ambiguous language, particularly where that language is not sufficiently complete to cover most of the potential breach situations.

II.

Finding By The Contracting Officer

What type of a finding by the Contracting Officer is necessary under Paragraph 2 of the General Conditions?

Assuming for purposes of argument only, that appellee must recover "lost profit," if at all, under the last sentence of paragraph 2, what then is the function of the Contracting Officer? The facts of this case are not now in dispute and never were. The breach

was clear and in fact as shown by the testimony of appellee's witness Ross (R-50) the problem of breach was discussed by that witness with appellant's president prior to readvertising of the buildings. This same witness (R-46) testified that he was a representative of the Contracting Officer. The testimony showed at least one later contact between the witness Ross and appellant on the occasion of the delivery of the certificate of award. Witness Ross testified (R-53) that he prepared and sent to the Regional Disposition Officer of the Public Housing Authority a summary of the data in this case for the purpose of considering suit against Oceanic (now Aerial) Lumber and Wrecking Company.

It is a logical inference from this witness's testimony that the General Accounting Officer Certificate of Settlement (R-60) was prepared from the data submitted by Ross. This is clearly compliance with paragraph 2 since it merely calls for a "determination" without regard to any particular form or its communication to the defaulting party.

Again assuming for argument's sake, no compliance with this provision, without any issue of fact to be decided by the Contracting Officer, how can appellant take advantage of a provision which is no more than an empty formality? At best it would serve

only as notification of the price of the subsequent sale. This was amply provided for by the General Accounting Office Certificate.

The provision for a determination by the Contracting Officer does not touch on any of the formalities of its execution. No time is set for the action, no requirement of a writing is imposed nor does the provision even provide that notification to the purchaser be given. Certainly no determination by the Contracting Officer could have been made prior to resale and at that time the purchaser's obligation became permanently fixed. The appellant cannot claim prejudice to his rights because a determination came from the General Accounting Office instead of from the individual he considered to be the Contracting Officer.

Appellant argues that the court cannot revise the parties' contractual agreement. This proposition does not, however, require absolute compliance with contractual terminology to the extent of requiring the doing of a useless thing.

CONCLUSION

Paragraph 2 of the General Conditions does not embody all the possible remedies for breach of this contract. Others are specifically spelled out elsewhere in the document, and show the ambiguity and incom-

pleteness of that paragraph. It is necessary to go outside the documents themselves in this fact situation and apply the usual principles of contract law pertaining to a breach, i.e., that the injured party shall be placed in the same position he would have occupied if the contract has been performed. 15 Am. Jur. 43.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
Assistant United States Attorney

Attorneys for Appellee

APPENDIX A

(Continued from Record P. 32)

4. *Licenses and Permits.* The Purchaser shall obtain and pay for all required permits, licenses and fees necessary in connection with its work, without cost or expense to the Government.

5. *Liability for Protection.* The Purchaser shall assume responsibility and be liable from and after the date of delivery to the Purchaser of an executed copy of this contract, for the care and protection of the property conveyed by this instrument.

6. *Time of Commencement and Completion of Work.* The Purchaser shall not commence work until he has made payment in full of the purchase price and until delivery to the Government of the Performance Security required under Paragraph 2 hereof and shall complete the removal of the buildings or structures and all clean-up operations within a reasonable period not to exceed 60 days from mailing of notice of acceptance of his offer. In the event the Purchaser fails to complete the removal and clean-up operations within 60 days, or by such extension thereof, as the Contracting Officer may approve, the Government may take possession of any property still on the site, destroy and otherwise dispose of it, and may charge the Purchaser with the cost of removing the dwelling and cleaning up the site without crediting the Purchaser with the salvage value of the material or construction work removed.

7. *Officials Not to Benefit.* No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

8. *Assignment.* Neither this contract nor any interest therein shall be assigned or transferred by the Purchaser to any other party. (Section 3737, Revised Statutes, as amended, 41 U.S.C. 15.)

9. *Covenant Against Contingent Fees.* The Purchaser warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract at its option to recover from the Purchaser the amount of such commission, percentage, brokerage, or contingent fee in addition to the consideration herewith set forth. This warranty shall not apply to commissions payable by the Purchaser upon the contract secured or made through bona fide established commercial agencies maintained by the Purchaser for the purpose of doing business. "Bona fide established commercial agencies" has been construed to include licensed real estate brokers engaged in the business generally.

10. *Non-Discrimination.* There shall be no discrimination by reason of race, creed, color, national origin, or political affiliation, against any employee or applicant for employment qualified by training and experience, for work in connection with this contract.

11. *Definitions.* The term "Contracting Officer" shall mean the person signing this contract for the Government or his duly authorized successor in office and any person authorized to act for him as his duly authorized representative.

12. Notice of acceptance of offer shall be made by depositing in the United States mails a notice addressed to the purchaser at the address designated in the offer.

13. No offer may be withdrawn without the consent of the Public Housing Administration for a period

of 30 days after the date of the first advertisement.

14. If a Government Agency has requested in its offer time beyond the end of said period to acquire funds to purchase or obtain transfer of funds and the Public Housing Administration has determined that additional time shall be allowed, the date of the settlement shall be so extended.